No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF FOR PROFESSOR THOMAS MERRILL AS AMICUS CURIAE SUPPORTING REVERSAL

THOMAS W. MERRILL
435 W. 116th Street
New York, NY 10027

WILLIAM M. JAY
Counsel of Record
LEVI W. SWANK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amicus Curiae

January 31, 2019

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Court Has Never Considered Head-On Whether To Apply A Different Standard Of Review To An Agency's Interpretation Of Its Regulations. 6

II. Applying The Reasonableness Standard To Agency Interpretations Of Their Regulations Is Incompatible With The APA. 11

A. Section 706 11

1. *Chevron* is compatible with Section 706 12

2. The delegation argument does not work in the context of regulations rather than statutes. 14

B. Section 553 16

III. The Court Should Adopt The Persuasiveness Standard In Reviewing An Agency's Interpretation Of Its Own Regulations. 19

IV. *Stare Decisis* Is No Reason To Adhere To The Reasonableness Standard. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 9, 23

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Brown v. United States,
113 U.S. 568 (1885) 22

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 8

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 7, 8

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 10, 20

City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013) 8

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,
557 U.S. 261 (2009) 9

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) ..... *passim*

Edward's Lessee v. Darby,
25 U.S. (12 Wheat.) 206 (1827) 21, 22

Gardebring v. Jenkins,
485 U.S. 415 (1988) 24

Gonzales v. Oregon,
546 U.S. 243 (2006) 10, 20

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 14

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 26

Maislin Indus. U.S., Inc. v. Primary Steel, Inc.,
497 U.S. 116 (1990) 2

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 10

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 8

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... *passim*

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 8, 25

Shalala v. Guernsey Mem'l Hosp.,
514 U.S. 87 (1995) 25

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) ..... *passim*

Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 ..... 24, 25

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 9, 10, 23

Udall v. Tallman,
380 U.S. 1 (1965) 9

United States v. Haggar Apparel Co.,
526 U.S. 380 (1999) 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 7, 8, 13

United States v. Moore,
95 U.S. 760 (1877) 22

United States v. Vowell,
9 U.S. (5 Cranch) 368 (1809) 21

United Student Aid Funds, Inc. v. Bible,
136 S. Ct. 1607 (2016) 26

Vt. Yankee Nuclear Power Corp. v. NRDC,
435 U.S. 519 (1978) 19

Statutes

5 U.S.C. § 551 (13) 12

5 U.S.C. § 553 ..... *passim*

5 U.S.C. § 706 ..... *passim*

5 U.S.C. § 706(2)(a) 13, 14

5 U.S.C. § 706(2)(e) 14

Other Authorities

Annotation, *Effect of Practical or Administrative Construction of Statute on Subsequent Judicial Construction*, 73 L. Ed. 322 (1929) 22

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1 (1996) 23

John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113 (1998) 13, 14

Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007) 21

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 19, 23, 24

Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002) 1

Thomas W. Merrill & Kristin Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001) 1

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969 (1992) 1

Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002) 1

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008) 1

Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014) 1

Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 17

BRIEF FOR PROFESSOR THOMAS MERRILL AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE AMICUS CURIAE

Amicus curiae Thomas W. Merrill is the Charles Evans Hughes Professor at Columbia Law School.[1] He has devoted much of his professional life to practicing, teaching, and writing about administrative law. His scholarly interests in this regard have centered on when and how much weight courts should give administrative interpretations of law in different contexts.[2] He has filed or written several previous *amicus* briefs in the Court on these topics.[3] His

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

[2] *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002); Thomas W. Merrill & Kristin Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969 (1992).

[3] Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *City of Arlington v. FCC*, Nos. 11-1545 & 11-1547; Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *Cuomo v. Clearing House Assn., L.L.C.*, No. 08-453; Br. for Ctr. for State Enforcement of Antitrust & Consumer Protection Laws as Amicus Curiae, *Wyeth v. Levine*, No. 06-1249; Br. for Ctr. for State En-

experience is also informed by his service as Deputy Solicitor General of the United States from 1987-1990, including in cases where agencies sought deference to their legal interpretations. *See, e.g.*, *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-36 (1990).

This brief is submitted in the hope that it will assist the Court in resolving the question presented.

SUMMARY OF ARGUMENT

I. This Court has never collectively deliberated about what standard of review should apply to an administrative agency's interpretation of its own regulation. Instead, starting with *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Court has assumed, without extensive analysis, that a highly deferential standard should apply in the regulatory-interpretation context—that a court should ask only whether the agency's interpretation is one that a reasonable interpreter could adopt.

In contrast, the Court has given extensive consideration to the proper weight to give agency interpretations of statutes they administer. In the statutory-interpretation context, the Court has identified three applicable standards: (i) *de novo* review (giving no weight to the agency interpretation); (ii) a standard, associated with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), that gives weight to an agency interpretation to the extent it has the "power to per-

---

forcement of Antitrust & Consumer Protection Laws as Amicus Curiae, *Watters v. Wachovia Bank, N.A.*, No. 05-1342; Br. for Prof. Thomas W. Merrill as Amicus Curiae, *United States v. Mead Corp.*, No. 99-1434.

suade"; and (iii) a standard, associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), that defers to the agency interpretation if it is a reasonable one, even if not the one the court thinks is best.

II. The selection of a standard of review should begin with the Administrative Procedure Act (APA). The APA, in Section 706, instructs reviewing courts to "decide all relevant questions of law," including "the meaning" of any applicable agency regulation. 5 U.S.C. § 706. That provision is difficult to square with the reasonableness (*Seminole Rock*) standard that courts currently apply.

Although agency interpretations of *statutes* receive deference under *Chevron*, even in APA litigation, that does not establish that deference is *per se* consistent with Section 706. Rather, *Chevron* comports with Section 706 for particular reasons that do not carry over to the regulatory-interpretation context. *Chevron* applies only when Congress vests an agency with primary interpretive authority. When Congress both creates a gap or ambiguity in a statute *and* delegates authority to the responsible agency to act with the force of law (through legislative regulations or binding adjudicatory decisions), Congress presumptively intends that the agency have primary authority to fill the gap or resolve the ambiguity. Thus, a reviewing Court "decide[s]" under the APA that Congress has delegated primary interpretive authority to the agency, and defers to the agency accordingly.

But this implied-delegation rationale does not apply to an agency's interpretation of its regulations.

Congress delegates to agencies the authority *to write* regulations; it generally does not separately delegate authority *to interpret* those regulations in an informal format that lacks the force of law. Deferring to an agency's informal interpretation of its regulations therefore is difficult if not impossible to reconcile with Section 706's prescription that a reviewing court should "decide all relevant questions of law."

The structure of the APA also indicates that courts should review informal agency interpretations of their own regulations for more than just reasonableness. The APA, in Section 553, carefully differentiates between the required procedure to issue a regulation having the force of law (a legislative rule) and the procedure to issue an interpretative rule. Legislative rules must ordinarily undergo exposure to the public through notice-and-comment rulemaking. Interpretative rules, in contrast, are exempt from this requirement. One consequence is that legislative regulations are binding on courts and regulated parties, whereas interpretative regulations are not. As a corollary, legislative regulations are entitled to strong *Chevron*-style deference, whereas interpretative regulations (insofar as they interpret statutes) are not. The *Seminole Rock* standard of review for administrative interpretations of regulations upsets this careful balance by affording near-controlling weight to administrative interpretations of regulation that are exempt from careful scrutiny and public oversight either *ex ante* (when they are promulgated) or *ex post* (when they are reviewed).

III. The persuasiveness standard associated with *Skidmore* strikes the appropriate balance for this

context. Neither *Chevron*'s reasonableness standard nor pure *de novo* review is suitable.

The persuasiveness standard pre-dates the APA, and Congress was certainly aware of the practice of giving some weight to persuasive agency interpretations. The persuasiveness standard also comports with the policy rationales of Section 553, given that agencies would now feel compelled to give supporting reasons when adopting an interpretation of a regulation, and those reasons would be subject to examination on judicial review. Furthermore, the persuasiveness standard would mitigate the infirmities individual Justices and commentators have identified with the use of the highly deferential *Seminole Rock* standard, including the temptation to "enact mush" and then clarify it with an interpretative regulation. On the other side of the ledger, the persuasiveness standard would require reviewing courts to engage with and give respectful consideration to the agency's experience in implementing the statutory regime and familiarity with its own regulations, respect that *de novo* review would not require.

IV. *Stare decisis* does not compel adherence to the *Seminole Rock* standard. Many members of the Court have long signaled that *Seminole Rock* should be, at a minimum, reconsidered. Given that the Court has (until now) adhered to the highly deferential *Seminole Rock* standard without considering whether some other standard like *Skidmore*'s persuasiveness standard would be superior, it is not clear that jettisoning the *Seminole Rock* standard and adopting a persuasiveness standard would require overruling the outcome of any previous decision.

ARGUMENT

I. The Court Has Never Considered Head-On Whether To Apply A Different Standard Of Review To An Agency's Interpretation Of Its Regulations.

As a preliminary matter, it is appropriate to note that the Court has not in any decision given sustained consideration to what standard of review is appropriate in reviewing agency interpretations *of their regulations*, and why. By contrast, in reviewing agency interpretation *of statutes*, this Court has developed three standards of review: one that accepts any agency view that is reasonable, one that considers the agency's view respectfully but adopts it only if it is persuasive, and one that gives no weight to agency views. This Court has never squarely decided whether, as this brief argues, the persuasiveness standard (or *Skidmore* standard) should govern when a Court reviews agency interpretations of regulations.

In particular, the Court has not thoroughly explained why courts should accept any reasonable agency interpretation of a regulation. "The first case to apply [that view], *Seminole Rock*, offered no justification whatever—just [] ipse dixit." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) (noting that "the Court announced" "the approach it would apply [in *Seminole Rock*]," "without citation or explanation"). And while subsequent cases have employed the standard articulated in *Seminole Rock* and offered

justifications for doing so, the Court has not, in any case, given careful consideration to whether applying a less deferential standard of review would be appropriate.

This is in sharp contrast to the question of the standard of review of agency interpretations of statutes, where the Court has considered the matter repeatedly and in depth. In that context, the Court has identified two standards of review that give some weight to an agency's interpretation. *See generally United States v. Mead Corp.*, 533 U.S. 218, 227-35 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 586-87 (2000). One standard that gives weight, which is associated with *Chevron*, 467 U.S. at 861-62, asks whether the agency interpretation is consistent with the text of the statute and is one that a reasonable interpreter might adopt, whether or not the court regards it as the best interpretation. The other standard that gives weight, which has come to be associated with *Skidmore*, 323 U.S. at 140, asks whether the agency interpretation is persuasive, given the thoroughness of the agency's consideration of the issue, whether the question draws upon the agency's expertise in the subject matter, the consistency with which the agency has maintained the interpretation, whether the interpretation is a post hoc rationalization developed in litigation, and other contextual factors. This brief refers to the *Chevron* standard as the "reasonableness standard" and the *Skidmore* standard as the "persuasiveness standard."

In the statutory-interpretation context, the Court has set a workable boundary between when the reasonableness standard applies and when the persuasiveness standard applies. The reasonableness

standard applies when Congress has delegated authority to an agency to act with the force of law to implement the statutory provision in question, *and* the agency has advanced its interpretation in the exercise of that delegated authority. *See generally City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Mead*, 533 U.S. at 227; *cf. Christensen*, 529 U.S. at 587. The critical determination is that Congress has delegated lawmaking authority to the agency with respect to the provision at issue, thereby signaling that it intends the agency, rather than the courts, to serve as the primary interpreter of that provision. If there is no such delegation from Congress to the agency, or if the agency does not exercise its lawmaking authority when it interprets the provision in question, then the persuasiveness standard generally applies when a court reviews the agency interpretation. *See Mead*, 533 U.S. at 237-38.

This reasoning does not carry over to the context of agency interpretations of regulations. The question in cases like this one is not whether the agency has the delegated power to write a regulation, but what the regulation means once it is written. And in deciding what weight to give the agency's own view in answering that question, this Court has simply assumed that the reasonableness standard is the appropriate default standard of review. *See, e.g., Decker*, 568 U.S. at 613; *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

Making matters even less clear, in some decisions the Court has nominally adhered to the reasonableness standard but has simultaneously invoked considerations more commonly associated with the persuasiveness standard. *See, e.g.*, *Decker*, 568 U.S. at 614 ("There is another reason to accord *Auer* deference to the EPA's interpretation: there is no indication that its current view is a change from prior practice or a post hoc justification adopted in response to litigation."); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 284 (2009) (holding that an internal agency memorandum was entitled to "a measure of deference" because it was "a reasonable interpretation of the regulatory scheme" based on an evaluation of five aspects of the interpretation); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (stating that the agency interpretation was not a post hoc rationalization and there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that "an agency's interpretation of a * * * regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view").

In none of these decisions has the Court offered a reasoned explanation for why a standard of reasonableness should be the general default standard as opposed to the persuasiveness standard or conceivably *de novo* review.[4] The Court has made clear that

---

[4] The Court's opinions have offered varying justifications for use of the reasonableness standard in the context of interpretations of regulations. *See, e.g.*, *Thomas Jefferson Univ.*, 512 U.S. at 512 ("[B]road deference is all the more warranted when, as

reasonableness cannot be the *exclusive* standard: For example, in *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012), the Court held that the reasonableness standard does not apply when parties have justifiably relied on a contrary, longstanding interpretation. The Court held that reliance interests warrant reviewing the agency's interpretation under a persuasiveness standard instead. *Id.* at 159 (quoting *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140)).[5] But the Court did not consider

---

here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) ("Because the Secretary promulgates these standards, the Secretary is in a better position * * * to reconstruct the purpose of the regulations in question."); *id.* at 151 ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Perez*, 135 S. Ct. at 1224-25 (Thomas, J., concurring in the judgment) ("A final proposed justification for *Seminole Rock* deference is that too much oversight of administrative matters would imperil the 'independence and esteem' of judges." (citations omitted)); *see generally id.* at 1222-25 (critiquing these justifications). But the Court has never weighed the case for applying a reasonableness standard, as opposed to a persuasiveness standard, in this context.

[5] The Court made another exception in *Gonzales v. Oregon*, 546 U.S. 243 (2006), holding that the reasonableness standard does not apply when an agency is interpreting a regulation that simply "parrots" the language of the statute. The interpretation of such a regulation, the Court held, should be treated as if

whether the persuasiveness standard might be more appropriate across the board.

Now is the time to decide that question. This case gives the Court the opportunity to consider head-on the appropriate standard of review, as the question presented. *See Decker*, 568 U.S. at 616 (Roberts, J., concurring).

II. Applying The Reasonableness Standard To Agency Interpretations Of Their Regulations Is Incompatible With The APA.

The analysis properly begins with the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Two features of the APA are especially relevant to the Court's analysis. One is Section 706, which expressly sets forth the standards courts are to apply in reviewing agency action and directs them to "determine the meaning" of that agency action themselves. The other is Section 553, the structure of which—with its different procedural requirements for legislative rules and what it calls "interpretative rules"—is inconsistent with the notion of giving strong deference to a interpretative document that is prepared behind closed doors without ever being subject to public input.

A. Section 706

The first sentence of Section 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and *determine the*

---

it were an interpretation of the statute, which will often mean applying a persuasiveness standard. *Id.* at 256-57, 268-69.

meaning or applicability of the terms of an agency action.

5 U.S.C. § 706 (emphasis added). "Agency action," for its part, is defined to include "the whole or part of an agency rule." 5 U.S.C. § 551(13). Thus, the emphasized language provides that it is the function of "the reviewing court" to "determine the meaning * * * of the terms of" an agency regulation. The question is whether a reviewing court can exercise this authority while giving weight to the views of the agency, and if so, how much weight and under what circumstances.

1. *Chevron* is compatible with Section 706.

Those seeking to reconcile reasonableness review with the APA have sometimes suggested that Section 706 cannot mean what it says, and that reasonableness review must be permissible, because the Court has accorded *Chevron* deference to agency interpretations of statutes even in cases reviewed under Section 706. That is not correct: *Chevron* (reasonableness review of agency interpretation of *statutes*) is compatible with Section 706 in a way that *Seminole Rock* (reasonableness review of agency interpretation of *regulations*) is not.

While the decision in *Chevron* itself did not harmonize its holding with Section 706, subsequent decisions have linked reasonableness review in the statutory interpretation context to Congress's delegation to the agency to implement the statute through directives having the force of law. *See Mead*, 533 U.S. at 226-27. If Congress delegates power to an agency to bind persons outside the agency by writing rules with the force of law, and if Con-

gress simultaneously leaves a gap or ambiguity in a statute the agency administers, then the agency in effect has been delegated authority to fill the gap or resolve the ambiguity. By giving the agency lawmaking authority and leaving a gap or ambiguity to resolve (the argument goes), Congress has signaled that the agency is to function as the primary interpreter of the gap or ambiguity by promulgating interpretations having the force of law. Thus, the court in these circumstances remains true to the APA's injunction to "decide all relevant questions of law" because it fairly interprets the relevant statute, typically the agency's organic statute, to mean that Congress intended the agency to fill gaps and ambiguities in the statute, provided it does so reasonably and with the force of law.

This argument carries the greatest weight when Congress has delegated authority to an agency to implement, carry out, or enforce a statutory provision with *regulations* having the force of law. If Congress delegates authority to an agency to issue so-called legislative regulations (*i.e.*, regulations that bind persons outside the agency, *Perez*, 135 S. Ct. at 1203), and through that delegation the agency resolves a gap or ambiguity in a provision of the statute, then the questions on judicial review of the regulation are whether the regulation violates the statute and, if not, whether it is otherwise arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(a). These two inquiries closely track the *Chevron* two-step. Hence, *Chevron*'s reasonableness standard of review can be derived from the nature of legislative rulemaking and the judicial-review provisions of the APA. *See* John F. Duffy, *Administrative Common*

Law in Judicial Review, 77 Tex. L. Rev. 113, 199-202 (1998).

A similar logic applies when Congress delegates authority to an agency to enforce a statutory regime through binding adjudications. If Congress delegates that authority to an agency, and the agency resolves a statutory gap or ambiguity in the course of an adjudication, then the question on judicial review of the adjudication would be whether the agency's decision violates the statute and, if not, whether it otherwise satisfies the substantial evidence standard of review (if applicable) or is otherwise arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(a),(e); *see, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

2. The delegation argument does not work in the context of regulations rather than statutes.

The implied-delegation rationale cannot justify the practice of deferring to any agency interpretation of a regulation so long as it is within the broad compass of "reasonableness." In that context, there is typically no statutory delegation that justifies deviating from Section 706's command that the reviewing court decide the meaning of the agency's action.

To be sure, if an agency interprets its own regulation in a format that (like the regulation itself) has the force of law, then the same argument about the exercise of delegated authority that justifies applying a reasonableness standard to the agency's interpretations of the statute would also apply to the agency's interpretation of its regulations. For example, if an agency clarifies a legislative rule with another legislative rule, the reasonableness standard should

apply in reviewing the second (clarifying) regulation just as it does in reviewing the first regulation. Similarly, if the agency clarifies a legislative rule in a formal adjudication that has binding effect, the reasonableness standard should apply to that interpretation.

But if the agency interprets its own regulation in a format that does not have the force of law—such as through an interpretative rule, a policy statement, an instruction manual, an opinion letter, an amicus brief, or, as in this case, an informal adjudication with no binding effect beyond the parties—the implied-delegation argument breaks down. This is because *all* agencies have authority to issue interpretative rules, policy statements, instruction manuals, opinion letters, and amicus briefs, even without specific statutory authority to fill gaps and make rules with the force of law. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 388 (1999) (observing that it is common "for agencies to give instructions or legal opinions to their officers and employees in one form or another, without intending to bind the public").

When an agency issues an interpretative rule (or other nonbinding pronouncement) that interprets one of its own regulations, there is no signal that Congress intended that the agency rather than the court should function as the primary interpreter of the regulation. There is no specific relevant delegation from Congress to the agency that the court can interpret to mean that "all relevant questions of law"—including questions about the meaning of an agency regulation—should be resolved by the agency within the wide bounds of reasonableness.

In order to extend the delegated lawmaking theory of *Chevron* to agency interpretations of regulations, one would have to identify a statute that delegates authority to the agency to interpret its own regulations through nonbinding interpretative rules (or in other nonbinding formats). Such a delegation might plausibly be interpreted to mean that Congress intended the agency to interpret its regulations in any fashion that the agency deemed appropriate, which, in turn, might justify applying a reasonableness standard to such interpretations. Such a delegation would be highly unusual, and certainly nothing like the one presented in this case. Consequently, it is unnecessary to consider whether such a delegation might satisfy the implied-delegation rationale for reviewing an agency's interpretation of its own regulation under a reasonableness standard.

B. Section 553

A second feature of the APA that calls into question the appropriateness of a reasonableness standard of review of agency interpretations of their regulations is grounded in the procedural requirements for rulemaking set forth in Section 553. That provision creates a structure that generally requires public participation (in the form of notice and comment) before an agency may craft a rule with the force of law. Judicial review should not be constrained in such a way as to give a rule the (effective) force of law *without* public participation.

Section 553 establishes the general proposition that an agency which wants to adopt a "rule" must comply with the statutory notice-and-comment procedures. *See* 5 U.S.C. § 553(b), (c). However, those subsections also provide that "interpretative rules"

and "policy statements" are exempt from these procedural requirements. The combination of the general proposition and the specific exceptions has always been understood to mean that "legislative rules"—those that bind persons outside the agency with the force of law—generally must be promulgated using notice-and-comment procedures. In contrast, "interpretative rules" may be promulgated without complying with these procedures. The justification for exempting interpretative rules and policy statements from notice and comment procedures is that such rules "do not have the force and effect of law and [thus] are not accorded that weight in the adjudicatory process." *Perez*, 135 S. Ct. at 1203-04.

This statutory framework creates what has been aptly called a "pay me now or pay me later" incentive structure for agencies. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1464 (2011). If the agency promulgates a legislative rule, it obtains the benefit of a legally binding directive that provides the basis for an enforcement action without further justification. In order to achieve this binding effect, however, the agency must incur an *ex ante* cost: it must submit the proposed rule to notice-and-comment procedures, which afford members of the public an opportunity to object to specific aspects of the regulation and require the agency to respond to those objections. In contrast, if the agency promulgates an interpretative rule, it can forgo the notice-and-comment process and issue the regulation simply by publishing it in the *Federal Register*. In forgoing public participation, however, the agency also eliminates any suggestion that the rule has the effect of binding the public. Thereafter, whenever the rule is put at issue

in litigation (whether through an enforcement action by the agency, or in a private civil action), the agency's interpretation is not binding on the court and is open to a more searching challenge.

The incentive structure embedded in Section 553 has been refined and reinforced by the dual standard of review recognized in *Mead* for agency interpretations of *statutes*. If the agency incurs the upfront cost of notice-and-comment procedures, it not only promulgates a legally binding rule; it also satisfies the conditions for having any legal interpretation reflected in the rule subject to review under the reasonableness standard (*Chevron*). If instead the agency decides to promulgate an interpretative rule without notice and comment, it not only forgoes any legally binding effect, it also subjects any statutory interpretation reflected in the rule to the more searching persuasiveness standard (*Skidmore*).

The application of reasonableness review to interpretative *regulations* upsets this carefully crafted incentive structure. Interpretative regulations, by the plain mandate of the APA, are exempt from the notice-and-comment requirements of Section 553 ("pay me now"). But subjecting the agency's interpretation of its own regulations to the highly deferential reasonableness standard greatly reduces the opportunity for serious scrutiny of such interpretation in subsequent litigation ("pay me later"). The agency's interpretation receives essentially the same deference as if the agency had subjected that interpretation to notice-and-comment rulemaking—even though it did not. Subjecting interpretative regulations to a reasonableness standard of review thus allows agencies to make law without meaningful public input or accountability to the public, either before or

after the interpretation is adopted. There should be no "pay me never" option.

III. The Court Should Adopt The Persuasiveness Standard In Reviewing An Agency's Interpretation Of Its Own Regulations.

The Court should take this opportunity to specify, definitively, the standard of review that applies to agencies' nonbinding interpretations of their own rules, and provide a justification for the standard selected. In choosing an appropriate default standard of review, the Court should give significant weight to the language, structure, and longtime understanding of the APA. The APA is a unique trans-substantive statute, the basic charter for nearly every agency throughout the far-flung operations of the federal government, and has been widely emulated by the states. It is important that the balance it has struck in framing required procedures be preserved. *See Perez*, 135 S. Ct. at 1206-07; *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-24 (1978). Other factors, such as the desirability of separating the law-promulgating function from the law-interpreting function, are also relevant. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 680-85 (1996). In light of these considerations, it is also appropriate to acknowledge the superior experience of the agency in implementing the statutory regime under which it functions, and its familiarity with its own regulations and how they operate.

In weighing these competing factors, it is important that the Court announce a clear default standard that applies in the context of agency inter-

pretations of their own regulations. In selecting an appropriate default standard, the goal of clarity is best served by adopting one that has a relatively robust history of prior application—if not in the regulatory-interpretation context, then in closely analogous situations. This consideration weighs against developing some new standard of review for use in reviewing agency interpretations of their regulations, perhaps one that falls between *Chevron* and *Skidmore*, or between *Skidmore* and *de novo* review. Lower courts, agencies, Congress, and the regulated community would likely find this confusing, at least until later decisions elaborate and refine the new standard. The Court should pick from the current menu.

For the sake of clarity, the Court should also make one selection—a single default standard, rather than a standard subject to a series of exceptions, such as those recognized in *Gonzales v. Oregon* (anti-parroting) and *Christopher v. SmithKline Beecham* (frustrated reliance). *See* pp. 10-11 & note 5, *supra*. The rule-with-exceptions approach creates uncertainty because of the uncertain scope of the exceptions, and further uncertainty about whether additional exceptions will be recognized in future cases.

Ambiguity about the appropriate standard will frustrate actors throughout the administrative-review system, regulators and regulated alike. A clear rule will benefit lower courts, which need to know what standard of review to apply in contested cases; agencies, which would benefit from knowing what kinds of procedural formats and what kinds of explanations about the meaning of their regulations will satisfy reviewing courts; and Congress, which will benefit from knowing what kinds of statutory signals will trigger what kind of judicial review. A

clear standard of review also benefits the many parties subject to regulatory oversight, which need to know what they can expect from agencies (and, hence, what they can challenge) when an agency takes an action.

Putting all this together, the persuasiveness standard is the best choice as a general default standard of review to apply to agency interpretations of their own regulations. First, as should be obvious, the persuasiveness standard (*Skidmore*) is a highly familiar standard of review in the statutory interpretation context. *See* Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1291-99 (2007) (surveying 106 court of appeals decisions applying the *Skidmore* standard over a five year period and offering helpful suggestions for a synthesis). Applying the same standard when reviewing agency interpretations of their regulations will allow courts to draw on this substantial body of precedent.

Second, the persuasiveness standard is much easier to reconcile with the APA than the reasonableness standard. The reasonableness standard, as discussed in Part II, is difficult to reconcile with the APA unless the agency acts with the force of law in adopting an interpretation of its own regulations. The persuasiveness standard, in contrast, is much closer to the approach courts took in reviewing agency interpretations of law in the pre-APA period. *Skidmore* itself was decided two years before the APA was adopted in 1946). Virtually from its earliest days, this Court gave "weight" to agency interpretations of law in certain circumstances. *See, e.g.*, *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 371 (1809); *Edward's Lessee v. Darby*, 25 U.S. (12

Wheat.) 206, 210 (1827); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Brown v. United States*, 113 U.S. 568, 570-71 (1885); *see generally* Annotation, *Effect of Practical or Administrative Construction of Statute on Subsequent Judicial Construction*, 73 L. Ed. 322 (1929) (citing hundreds of state and federal cases discussing deference to administrative positions). The framers of the APA were surely familiar with this background. Even if they assumed courts would exercise independent judgment in determining the "meaning or applicability of the terms of an agency action," including agency rules, they would hardly be surprised if courts looked to the agency interpretation for guidance and would follow the agency if they found its views persuasive.

The persuasiveness standard also is more compatible with the structure of incentives created by Section 553. Under the reasonableness standard, an agency that interprets its own regulation is not required to "pay now" (by following notice-and-comment procedures) and is required to "pay later" only a minimal amount (that needed to convince a reviewing court that its interpretation is reasonable). Under the persuasiveness standard, an agency will have to put greater effort, at the time it renders an interpretation, into explaining how the interpretation is consistent with the regulation, how it advances the agency's regulatory objectives, and why the interpretation is not merely designed to affect the outcome of pending litigation, as well as addressing other possibly relevant factors. In other words, it will have to "pay some" in issuing its interpretation—not in terms of formalized public participation but in terms of developing a better reasoned decision. Upon judicial review, the agency will also be put to

the task of explaining why its interpretation is persuasive, under the factors identified by *Skidmore* and in later decisions applying the persuasiveness standard. It will have to "pay some more" in terms of a more searching judicial inquiry into the rationale for its interpretation. Paying some now and paying some more later aligns better with the incentive structure of Section 553.

Finally, the persuasiveness standard would address many of the infirmities associated with use of the reasonableness standard in this context. Both Justices and commentators have sharply criticized the *Seminole Rock/Auer* regime for allowing agencies to (i) evade the notice-and-comment provisions of the APA by "enact[ing] mush" and then clarifying it in an interpretive regulation;[6] (ii) change interpretations of regulations in response to the changing policy preferences of different administrations;[7] (iii)

---

[6] *See, e.g.*, *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("To expand this ["notice-and-comment-free"] domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment."); *Thomas Jefferson Univ.*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 12 (1996) (*Auer* "generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures"); Manning 655-60.

[7] *See, e.g.*, *Decker*, 568 U.S. at 618-19 (Scalia, J., concurring in part and dissenting in part) (noting that "the leadership of

change interpretations of regulations in ways that frustrate the legitimate expectations of regulated entities;[8] (iv) adopt interpretations designed to affect the outcome of pending litigation against the agency;[9] (v) accumulate unchecked governmental power in the executive branch;[10] and (vi) become "more vulnerable to the influence of narrow interest groups."[11] The persuasiveness standard would require agencies to give a reasoned explanation for its interpretations, which would include an explanation for why any of these potential criticisms, if applicable, is inapposite or is outweighed by other considerations. This explanation would be subject to probing on judicial review.

The persuasiveness standard would be no panacea. But it would do more to rein in these forms of administrative mischief than the reasonableness standard. This would be at least a small measure of progress in administrative law.

---

agencies (and hence the policy preferences of agencies) changes with Presidential administrations").

[8] *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (Scalia, J., concurring) (*Auer* "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government").

[9] *See, e.g., Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988) (deferring to the agency's interpretation despite "recogniz[ing] that the Secretary had not taken a position on this question until this litigation.").

[10] *See, e.g., Perez*, 135 S. Ct. at 1217-22 (Thomas, J., concurring in the judgment); Manning 680-85.

[11] *See, e.g.*, Manning 676-80.

IV. *Stare Decisis* Is No Reason To Adhere To The Reasonableness Standard.

If the Court concludes that something other than the reasonableness standard is appropriate as a general default standard, it is not clear that any of its prior decisions would need to be disturbed. That is because, in deciding whether to accept or reject an agency's interpretation of its own regulations, the Court has never considered whether the use of a reasonableness standard, as opposed to the persuasiveness standard, would result in a different outcome. Under the reasonableness standard, as illustrated by the decision of the court of appeals below, once the Court concludes that the agency's interpretation is reasonable, its inquiry ends. *See, e.g.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 101 (1995); *Methow Valley*, 490 U.S. at 358-59. But often, the agency's "reasonable" interpretation is also the most persuasive one. *See, e.g.*, *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 63 (describing the agency's interpretation as "[t]he better reading of the regulation").

It is therefore uncertain at best whether the Court would have reached a different result in any of its cases applying *Seminole Rock* had the persuasiveness standard been applied instead.[12] Concerns

---

[12] *Decker* is not to the contrary, despite Justice Scalia's statement in his partial concurrence and dissent that "the Court's deference to the agency makes the difference." 568 U.S. at 617. Justice Scalia appeared to assume the alternative to *Seminole Rock* was *de novo* review. Whether a different outcome would have been reached by applying a *de novo* standard of review is a separate question entirely from whether a different outcome would have been reached by applying the persuasiveness standard. Had the persuasiveness standard been applied in

that would otherwise counsel adhering to precedent have little force in disapproving a standard of review that cannot be shown to have been outcome-determinative in any particular case. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (reasoning that rejecting a standard announced in previous cases did "not require [the Court] to disturb any [] prior holdings" because it was never applied by the Court to determine the outcome of a case).

Nor should the Court be concerned that departing from the reasonableness standard may upset decisions of the lower courts or the expectations of litigants. Over the past decade, Justices have expressed—in numerous dissenting and concurring opinions—that the Court has been "await[ing] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *E.g.*, *Perez*, 135 S. Ct. at 1211 (Alito, J., concurring in part and concurring in the judgment). Predictability and reliance concerns have less bearing where "[a]ny reader of this Court's opinions should think that the doctrine is on its last gasp." *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

The time has come to consider what standard of review should apply as a general default when courts review an agency's interpretation of its own regulations. For the reasons set forth herein, the best default standard is the persuasiveness standard associated with *Skidmore*.

Decker, the Court likely would have reached the same result. *See, e.g.*, 568 U.S. at 614 (noting that "[t]he agency has been consistent in its view" of the regulation at issue, a relevant factor under *Skidmore*).

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for the court of appeals to apply the persuasiveness standard articulated in *Skidmore*.

Respectfully submitted.

THOMAS W. MERRILL
435 W. 116th Street
New York, NY 10027

WILLIAM M. JAY
Counsel of Record
LEVI W. SWANK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amicus Curiae

January 31, 2019